1917

Rules of the Conflict of Laws Applicable to Bills and Notes

Ernest G. Lorenzen

THE RULES OF THE CONFLICT OF LAWS APPLICABLE TO BILLS AND NOTES

III. Interpretation and Obligation*

A. The Governing Law.

2. Relationship of the Different Contracts.

a. *Theory of the Independence of the Different Contracts.* Whichever rule is adopted as the governing law the question will be whether the obligation of the maker's, acceptor's, drawer's and indorser's contracts entered into in different jurisdictions shall be subjected to different laws, or whether all of the parties must be presumed to have contracted with reference to a single law.

(1) *English Law:* Section 72, Bills of Exchange Act provides:

"(2) Subject to the provisions of this Act, the interpretation of the drawing, indorsement, acceptance, or acceptance supra protest of a bill, is determined by the law of the place where such contract is made." . . .

"(3) The duties of the holder with respect to presentment for acceptance or payment and the necessity for or sufficiency of a protest or notice of dishonour, or otherwise, are determined by the law of the place where the act is done or the bill is dishonoured."

(2) *American Law:* The great weight of authority applies the law of the place of performance to each of the contracts on a bill or note, and holds that the drawer and indorser do not promise to pay at the place of payment of the principal obligation, but at the place where their contract is entered into.[46] A few cases take the contrary view.[47]

(3) *French Law:* The contracts of the drawer and indorser are subject to the law of the place where they are

*Continued from 1 Minnesota Law Review, p. 256.

46. Crawford v. Bank, (1844) 6 Ala. 12, 41 Am. Dec. 33; Hunt v. Standart, (1860) 15 Ind. 33, 77 Am. Dec. 79; National Bank v. Green, (1871) 33 Ia. 140; Short v. Trabue, (1863) 4 Met. (Ky.) 301; Wood v. Gibbs, (1858) 35 Miss. 559; Price v. Page, (1856) 24 Mo. 67; Briggs v.

entered into, unless an intention to the contrary appears.[48]

(4) *German Law:* The German law agrees with the majority rule in the United States.[49]

(5) *Italian Law:* The law of Italy agrees in general with that of France.[50] When the parties are subjects of the same country they will be deemed to have contracted with reference to their national law.[51]

The law of the above countries is thus agreed upon the principle of the independence of the different contracts on a bill or note. They regard the law of the place where the contract of a drawer or indorser is entered into as controlling the obligation of the contract. France and Italy do so in conformity with the doctrine of the applicability of the lex loci contractus, while Germany and the United States reach the same result by virtue of the application of the lex loci solutionis, which they regard as coinciding with the lex loci contractus.

In the words of Story:

"The drawer and indorsers do not contract to pay the money in the foreign place on which the bill is drawn; but only to guarantee its acceptance and payment in that place by the drawee; and in default of such payment they agree upon due notice to reimburse the holder in principal and damages at the place where they respectively entered into the contract."[52]

Latham, (1887) 36 Kan. 255, 59 Am. Rep. 546; Kuenzli v. Elvers, (1859) 14 La. Ann. 391, 74 Am. Dec. 434; Freese v. Brownell, (1871) 35 N. J. L. 285, 10 Am. Rep. 239; Mackintosh v. Gibbs, (1911) 81 N. J. L. 577, 80 Atl. 554, Ann. Cas. 1912D 163; Trabue v. Short, (1866) 18 La. Ann. 257; Powers v. Lynch, (1807) 3 Mass. 77; Williams v. Wade, (1840) 1 Met. (Mass.) 82; Aymar v. Sheldon, (1834) 12 Wend. 439, 27 Am. Dec. 137; Spies v. National City Bank, (1903) 174 N. Y. 222; 66 N. E. 736; 61 L. R. A. 193; Amsinck v. Rogers, (1907) 189 N. Y. 252, 82 N. E. 134, 121 Am. St. Rep. 858, 12 L. R. A. (N. S.) 875; Lenning v. Ralston, (1854) 23 Pa. St. 137; Read v. Adams, (1821) 6 Serg. & R. (Pa.) 356; Douglas v. The Bank of Commerce, (1896) 97 Tenn. 133, 36 S. W. 874; Warren v. Citizens Bank, (1894) 6 S. D. 152, 60 N. W. 746; Raymond v. Holmes, (1853) 11 Tex. 54.

47. Dunn v. Welsh, (1879) 62 Ga. 241; Hibernian National Bank v. Lacombe, (1881) 84 N. Y. 367; Peck v. Mayo, (1842) 14 Vt. 33, 39 Am. Dec. 205.

48. Cass. Feb. 6, 1900 (S. 1900. 1. 161).

49. 9 RG 431 (March 28, 1883); 24 RG 112 (Nov. 5, 1889); 44 RG 431 (Oct. 4, 1889).

50. Cass. Florence April 8, 1895 (S. 1896. 4. 7); Cass. Florence Jan. 16, 1888 (15 Clunet 735).

51. Art. 9. Prel. Disp. Civil Code; Cass. Naples, Jan. 4, 1898 (La Legge, 1898. 1. 617).

52. Sec. 315.

The same view is expressed by Chancellor T. Pemberton Leigh in the case of *Allen v. Kemble.*[53] He says:

"It is argued, that this bill, being drawn payable in London, not only the acceptor, but the drawer, must be held to have contracted with reference to the English law. This argument, however, appears to us to be founded on a misapprehension of the obligation which the drawer and indorser of a bill incurs. The drawer, by his contract, undertakes that the drawee shall accept and shall afterwards pay the bill, according to its tenor, at the place and domicile of the drawee if it be drawn and accepted generally: at the place appointed for payment, if it be drawn and accepted, payable at a different place from the place of domicile of the drawee. If this contract of the drawer be broken by the drawee, either by non-acceptance or non-payment, the drawer is liable for payment of the bill, not where the bill was to be paid by the drawee, but where he, the drawer, made his contract, with his interest, damages, and costs, as the law of the country where he contracted may allow."

As for the English law, it is difficult to harmonize subdivisions (2) and (3) of Section 72 of the Bills of Exchange Act. For an explanation of the subdivisions see the beginning of Part III. As it stands, the interpretation and obligation of the different contracts would be governed by the law of the place where such contracts are made, while the necessity of presentment, protest and notice are controlled "by the law of the place where the act is done or the bill is dishonoured."

b. *Theory that a Single Law Should Govern.* Under the doctrine of the independence of the different contracts there is a possibility that one party may be liable under the law governing his contract, and yet because of a difference in the law governing the other contracts, have lost, without any personal fault of his own, all rights of recourse against the prior parties. Such a contingency is avoided if all parties can be deemed to have contracted with reference to a single law (Einheitstheorie). Some of the older authors[54] were of the opinion that all of the parties must be deemed to have contracted with reference to the law of the domicile of the drawee which they regarded as the place at which the exchange contract had its seat, but this theory is now completely abandoned on the con-

53. (1848) 6 Moore P. C. 314.

54. Pothier, Traité du Contrat de Change, Sec. 155; Brocher, Cours, II, pp. 315-16.

tinent, where the doctrine of the independence of the different contracts is admitted on principle by all at the present day.[55]

In this country the old view is still entertained by a few authors. Minor does so upon grounds of expediency. He says:[56]

"Expediency would seem to pronounce in favor of the latter view, and it is believed to be the better. To give every indorsement its own separate locality would impair most seriously the value of all negotiable instruments, even those which are in fact purely domestic, since the holder could not know where the prior indorsements were made and hence could not tell what the liabilities of the prior indorsers are, nor what steps he must take to secure that liability. The tendency of this rule is to destroy or impair the negotiability of such instruments. On the other hand, to hold the locus solutionis of each indorsement to be identical with the locus solutionis of the original contract creates one single law by which the liabilities of all the indorsers are to be ascertained, and would prevent the inconvenience (to use a mild term) to the holder of having to ascertain and comply with a number of different laws as to protest, notice of dishonor, and other steps to be taken in order to fasten responsibility upon the indorsers."

Daniel[57] reaches the same conclusion on principle. His view is set forth in the following words:

"This doctrine that the drawer and indorser are bound according to the law of the place of drawing or indorsing, although sustained by great weight of opinion, and an overwhelming current of authorities, has not escaped criticism and dissent, and rests, as it seems to us, rather upon the sanction of decisions than upon clear and well-defined principles. If A, in New York, draws a bill on B, in Richmond, directing him to pay $1,000 at the First National Bank, in Raleigh, N. C., he thereby guarantees to C, the payee, that the money shall be there paid by B on the day of its maturity. He is as clearly bound as B is, although secondarily, that the money shall be paid at the time and at the place named. If either tenders the amount at the time and place, it would be a good tender. And, although A's liability is contingent upon due notice of dishonor, the liability is, nevertheless, for breach of his contract

55. Asser, p. 210; Audinet, pp. 612-18; von Bar, p. 677; Champcommunal, Annales de Droit Commercial, 1894, II, p. 155; Despagnet, p. 990; Diena, III, p. 601; Principi, II, p. 212; Fiore, I, p. 178; Esperson, p. 38; Grünhut, II, pp. 578-79; Jitta, II, p. 76; Lyon-Caen et Renault, IV, pp. 558-59; Meili, II, p. 334; Ottolenghi, p. 165; Schäffner, p. 121; Valéry, p. 1283; Weiss, IV, p. 459.

56. P. 396.

57. Sec. 901.

that B should pay at Raleigh. He has contracted that the amount shall be there paid by the hand of B, and yet his contract is regarded as being governed by the law of New York; while B's contract to pay by his own hand is governed by the laws of North Carolina. This seems to us an inconsistency of the law; and while the doctrine is now perhaps too well settled to be disturbed, it does not bear the test of searching analysis."

c. *Resolutions of the Institute of International Law.* The Institute adopted the theory of the independence of the different contracts in the following resolution:[58]

"II. The effect and validity of a bill of exchange and a promissory note, of the indorsements, acceptance, and aval shall be governed by the law of the country in which these different acts occurred, without prejudice to the rules relative to the capacity of the parties. . . ."

The theory is abandoned, however, in important respects. The following resolutions show the extent to which the law of the place of issue is to control.[59]

"II. . . . The effect of the supervening contracts however, shall not be greater in extent than that resulting from the creation of the instrument itself.

"III. The time allowed for presentment of bills of exchange and promissory notes payable at sight or after sight is determined by the law of the place where the original instrument was issued.

"IV. The duties of the holder with respect to presentment for acceptance and payment are fixed by the law of the place where the bill or note has been issued.

"VI. The defence of accident and vis major is allowed only if it is recognized by the law of the place of issue of the original instrument.

"VII. The time within which the right of recourse may be exercised against the indorsers or the other guarantors and against the drawer, or within which a direct action may be brought against the acceptor, is fixed by the law of the country in which the act which gives rise to the action took place.

"However, as against the indorsers and the other guarantors, the time can never exceed that laid down for the right of recourse against the drawer."

In some respects the law of the place of payment governs. Resolution V provides:[60]

58. Annuaire, VIII, p. 121.
59. Id., pp. 121-22.
60. Id., p. 122.

"The law of the place where payment is to be made determines the mode of showing default of acceptance or payment and the form of protest, as well as the time within which it may be made.

"The notices to be given to the guarantors for the preservation of the right of recourse in case of default of acceptance or payment and the time within which such notices may be given, are governed by the law of the place from which these notices are to be sent."

d. *Discussion of Foregoing Theories.* The theory that a single law should govern the obligations of the various parties to a bill or note has obvious advantages over that of the independence of the different contracts. In case of recourse no difficulties can arise under the former theory from a possible difference in the law of the states in which the contracts of the different parties may have been entered into. If in the framing of the Uniform Law a single law were to be chosen to regulate the rights and obligations of all parties, such a result might be reached by one of two courses. The law of the place of payment might be accepted as the rule governing the obligation of contracts with a provision that the contracts of the drawer and indorser shall imply a promise to pay at the place where the principal obligor agrees to pay, instead of being regarded as contracts of indemnity. The other course would be to recognize the lex loci contractus as the controlling law and then to provide that all parties must be deemed to have contracted with reference to the law of the place of issue of the original instrument. The writer of this article is not able to recommend the adoption of either of these courses. He cannot accept the view underlying the resolutions of the Institute of International Law because there is no reason to assume that when the different parties entered into their respective contracts they had in contemplation the law governing the drawer's contract. In so far as the nature of the original contract is concerned such a presumption is perfectly fair and necessary. For example, where the original instrument is negotiable under the law of the place of issue an indorser by the very act of becoming a party to such instrument may be presumed to have intended to incur the liability of an indorser of a negotiable bill or note. However, an assumption that the contract of the acceptor and the indemnity contracts of the indorsers were all entered into with reference to the law creating

the original instrument is quite another matter and does not rest upon a reasonable basis. Every probability favors the presumption that each of them at the time of entering the contract had in mind the lex loci of his own contract.

The alternative first suggested rests upon two assumptions: First, that the lex loci solutionis determines the obligation of contracts; second, that the drawer and indorser promise to pay at the place of payment of the bill or note.[61] As the writer of this article is of the opinion that the Uniform Law should adopt the lex loci contractus as the governing rule and not the lex loci solutionis, it is impossible for him to approve the solution suggested by Minor and Daniel. If, contrary to the author's recommendation, the Uniform Law should adopt the lex loci solutionis, the question would be whether the law of the place of payment of the bill or note should not be chosen also as the law controlling all supervening contracts. This could be done by accepting the view that the drawer and indorser promise to pay at the place of payment of the bill or note and not where they entered their respective contracts. Such a rule would run, however, counter to the overwhelming weight of authority on this point in this country. It would be opposed also to the law of England,[62] France and Italy and to that of Germany, notwithstanding the fact that the lex loci solutionis controls the obligation of contracts in Germany. As for the text writers, most of them feel that the traditional rule should be retained.[63] The author is not satisfied that any deviation from strict principle is necessary. It is true that under the doctrine of the independence of the different contracts it is possible for one party to be held under the lex loci of his contract although all means of recourse may be cut off against all prior parties. But such a contingency would not be removed

61. The phrase "place of payment of the bill or note" is used here to designate the place where the maker of a note or the acceptor of a bill of exchange agrees to pay, and the residence of the drawee, where the bill is not accepted.

62. See Gibbs v. Fremont, (1853) 9 Exch. 25; Chalmers, pp. 244-45.

63. Asser, p. 210; Audinet, p. 620; Beauchet, Annales de Droit Commercial, 1888, II, p. 63; Diena, III, p. 209; Fiore, Elementi, p. 459; Ottolenghi, p. 472; Surville et Arthuys, p. 690; Staub, Art. 86, Sec. 8.

A good many writers, however, feel that, inasmuch as the creditor is being kept out of his money at the place of payment of the original instrument, the law of that state should govern the measure of damages with respect to all parties. Von Bar, p. 681; Champcommunal, Annales de Droit Commercial, 1894, II, p. 259; Chrétien, p. 213; Esperson, p. 75; Lyon-Caen et Renault, IV, p. 561; Valéry, p. 1288; Weiss IV, p. 467.

completely, even if the view of Daniel and Minor were accepted, unless the Statute of Limitations were regarded as relating to the substance rather than to procedure and were governed by the lex loci solutionis instead of by the law of the forum, as is the established rule in England and the United States, and it is doubtful whether the American law is ready to adopt the continental rule in this respect. With the reasonable limitations that should be placed upon the doctrine of the independence of the different contracts on a bill or note, as will appear below, it is believed that cases of actual hardship will arise only under exceptional circumstances. In the estimation of the writer there are thus no sufficient grounds for the adoption by the Uniform Law of the theory of a single law governing all of the contracts, in either of the forms above suggested. The author would recommend, therefore, the adoption of Article 72 (2) paragraph 1 of the Bills of Exchange Act, notwithstanding the fact that this particular provision may have found its way into the English law as the result of a misunderstanding of Story.

e. *Limits of the Theory of the Independence of the Different Contracts.* All authorities supporting the doctrine of the independence of the different contracts on a bill or note are forced to admit that there are necessary limitations to the operation of this rule. These limitations result from the fact that there is but one original instrument and contract, all the other contracts being superimposed or accessory. The courts, however, have not always borne in mind that the doctrine of the independence of the different contracts cannot be reasonably carried to the point of affecting the nature or interpretation of the original instrument. In the absence of an express qualification the reasonable assumption must be that each party accepting or indorsing a bill or note must have done so upon the basis of the original contract.

There is universal agreement that everything affecting the manner of presentment for acceptance and payment and the mode of protesting a bill or note must be done in accordance with the law of the state in which such presentment and protest must be made. This rule is the only practicable one. Hence all other parties are deemed to have intended, as reasonable men, that the acts which have to be done in a particular place should be carried out in the mode prescribed by the law or usage prevailing at such place.

Beyond this there is conflict. Most of the problems will be considered separately later in this article. They will raise the question whether one law should determine, with respect to all parties (1) the maturity of the instrument; (2) the time within which the presentment of bills of exchange, payable at sight or after sight, must be made; (3) the amount of recovery; (4) the necessity of presentment, protest and notice; (5) the time within which notice must be given; (6) the defence of accident or vis major.

One of the problems that may be discussed to advantage in this place relates to the negotiability of the instrument. We must assume in the present discussion that the instrument is a bill or note, for we are considering here the obligation of a contract and not the validity of the instrument as a bill or note. The latter question was discussed in Part II of this article. The present problem may be suggested by means of the following cases:

1. Suppose that Jones executes in London to Smith of New York, a promissory note in which he promises to pay Smith $500. Smith indorses the note in New York to Adams. Neither the original instrument nor the indorsement contain words of negotiability. Under the Bills of Exchange Act the note is fully negotiable; under the law of New York it is not, for want of words indicating that it is payable "to order or bearer." Has Smith indorsed a negotiable or a non-negotiable note?

2. Suppose that a note is made and payable in the state of X to "Smith or order", that it is indorsed by Smith in the state of Y and that the note is not commercial paper under the law of the state of Y, although it is fully negotiable under the law of the state of X, can Smith be held as the indorser of commercial paper?

3. Suppose that the note in the first case was issued in New York and was indorsed in London, the instrument and the indorsement having the same form as before.

4. Suppose that the note in the second case was executed in the state of Y and was indorsed in the state of X, the instrument and the indorsement having the same form as before.

There are cases[64] in this country similar to the second one, of which *Hyatt v. The Bank of Kentucky*[65] is typical. In that case a note, executed and payable in Louisiana, was indorsed in Kentucky. It was held that the quality of the instrument as commercial paper should be determined, as regards the Kentucky indorser, in accordance with the law of Kentucky. The reasoning of the court was as follows:

"Those, however, who become parties to it in Kentucky by indorsement, the legal effect of this indorsement, so far as it applies to them, must be determined by Kentucky law; nor will the existence of extrinsic circumstances, such as the knowledge on the part of the indorser of the legal character of the paper where it was enacted, change the character or degree of his liability. A party may know when he indorses a paper in Kentucky executed in Louisiana, that the law of the latter state imposes a different liability from the law of Kentucky, and still his assignment, being of itself an independent contract, must be regulated by the law where the contract is made, and no presumption should be indulged in to change its legal effect; and if presumptions are to determine these questions, it would be equally as just to presume that the party intended to be bound by the law of the place or state where the contract was made as that he intended to make himself liable under another and different law.

"It is to the interest of trade and commerce that there should be some fixed and permanent rule governing contracts of this character; and, with this rule established, no mere circumstances or presumptions should be permitted to fix a liability upon such paper other than the liability imposed by the law of the place where the contract is made."

Not only may the law governing the contracts of the different parties to a bill or note determine whether, with respect to such parties, the instrument shall be deemed negotiable, but the law of the forum also may control this question, for example, when the right of the assignee or indorsee to sue in his own name is involved.[66]

---

64. Hyatt v. The Bank of Kentucky, (1871) 8 Bush. (Ky.) 193; Nichols v. Porter, (1867) 2 W. Va. 13. 94 Am. Dec. 501. See also Baker Company v. Brown, (1913) 214 Mass. 196, 100 N. E. 1025.

65. (1871) 8 Bush. (Ky.) 193.

66. See Roads v. Webb, (1898) 91 Me. 406; 40 Atl. 128; Haker v. Nat. Bank, (1895) 61 Ill. App. 501; Woods v. Ridley, (1850) 11 Humph. (Tenn.) 194; Lodge v. Phelps, (1799) 1 Johns. Cas. 139; Warren v. Copelin, (1842) 4 Met. (Mass.) 594.

In the last edition of Wharton,[67] the following summary statement is made concerning the law governing the negotiability of instruments.

"The cases, however, are by no means agreed that the question as to the negotiability of a particular instrument is always to be determined by the law of the same jurisdiction, without reference to the particular quality or incident involved in the case. For this reason the question of the governing law with respect to negotiability cannot be satisfactorily treated in a general and abstract manner, and without reference to the particular quality or incident dependent upon the character of the instrument in that respect. . . .

"It may be pointed out in this connection, however, that according to the weight of authority, although there is some conflict upon the point, the negotiability of an instrument, as affecting the respective rights of one who has been fraudulently deprived of it, and one who has obtained the same from or through a third person who had no authority to transfer it, depends upon the law of the place where the transfer to the present holder took place, and not necessarily upon the substantive law of the original contract."

Lack of space precludes a thorough treatment of this question at the present time. It may be, that the English cases cited in support of the last paragraph quoted from Wharton,[68] relating as they do to foreign government bonds and to certificates of stock in foreign corporations, laid down a rule which is dictated by sound considerations of policy, especially in a place like England which has been the leading financial center of the world. Whatever attitude policy may dictate in this regard, it is submitted that the same considerations are not necessarily applicable to bills and notes. On the continent it is generally assumed that the law of the place of issue must fix the character of the instrument throughout its life, and that all parties, in the absence of an express declaration to the con-

67. By Parmele, II, p. 966.

68. The cases relied upon are the following: Gorgier v. Mieville, (1824) 3 Barn. & C. 45, 4 Dowl. & R. 641, 2 L. J. K. B. 206; Lang v. Smyth, (1831) 7 Bing, 284, 5 Moore & P. 78, 9 L. J. C. P. 91; Goodwin v. Robarts, (1876) L. R. 1 App. Cas. 476, 45 L. J. Exch. N. S. 748, 35 L. T. N. S. 179, 24 W. R. 987; Picker v. London & County Bkg. Co., (1887) L. R. 18 Q. B. Div. 515, 56 L. J. Q. B. N. S. 299, 35 W. R. 469; Williams v. Colonial Bank, (1888) L. R. 38 Ch. Div. 388, 57 L. J. Ch. N. S. 826, 59 L. T. N. S. 643, 36 W. R. 625; affirmed in L. R. 15 App. Cas. 267, 60 L. J. Ch. N. S. 136, 63 L. T. N. S. 27, 39 W. R. 17.

See also Baker Co. v. Brown, (1913) 214 Mass. 196, 100 N. E. 1025 Compare Wylie v. Speyer, (1881) 62 How. Pr. 107; Savings Bank v. Nat. Bank of Commerce, (1889) 38 Fed. 800.

trary, must be deemed to have contracted upon that basis.[69] The writer of this article is of the opinion that this represents the correct view, at least with regard to the supposititious cases (1) and (2) above. Why should a party, accepting or indorsing a bill or note, executed in another state or country, be allowed to question the character of the instrument? Such a right is certainly not in furtherance of the security of dealings in negotiable paper. The very object of the law of bills and notes is to facilitate the circulation of these instruments. Unless considerations of justice to the acceptor and indorser make it imperative that the character of the original instrument be determined in accordance with his own law, the law of the original place of issue should certainly control. Otherwise a bill or note intended to be negotiable and so created by the law of the place of issue would cease to be such with respect to the acceptor or any one of the indorsers if the lex loci of their respective contracts should regard the instrument as non-negotiable. However true the doctrine of the independence of the different contracts may be in general, the fact remains that there is one original contract and that the rest are superimposed upon and have for their purpose the carrying out of the original contract. It is difficult to see how an acceptor or an indorser can complain if he is charged with knowledge of the law of the state or country in which the instrument is issued. His willingness to become a party to such an instrument implies, of itself, a readiness to contract on the basis of its original character. Based upon commercial convenience, because of its tendency to facilitate the circulation of bills and notes, and the security of dealings with respect thereto, a presumption to this effect is, to say the least, reasonable.

It does not follow, however, that the same principle must, of necessity, be applied to the supposititious cases (3) and (4). Just as in the matter of formality where the original instrument is void for want of compliance with the law of the place of issue, but is valid under the lex loci contractus governing the acceptor's or the indorser's contract, liability is imposed by the English and German acts on mere grounds of policy, having for its object the security of local dealings in bills and notes, for like reasons it may be provided in the supposititious

69. See Diena, Principi, II, p. 312; Ottolenghi, p. 211; von Bar, p. 676, note 47.

cases (3) and (4) that the indorser of a note, which is non-negotiable under the law of the place of issue, but is negotiable under that of the place of indorsement, shall be deemed to have assumed the liability of a regular indorser of commercial paper.

The attitude of the American courts, determining the negotiability of bills and notes now by one law, now by another, according to the nature of the question before them, or the party that is being sued, is responsible for much of the confusion now to be found in the law of bills and notes, and cannot be condemned too severely.

B. Specific Questions.

1. Effect of Negotiation in Another State.

The contracts of the maker and acceptor, in accordance with the foregoing conclusion, are subject to the law of the place of contracting.[70] This law should determine the nature, interpretation and obligation of the contract, the conditions upon which liability is assumed and the defenses, legal and equitable, which may be available.[71] As regards the contracts of the drawer and indorser it has been pointed out that they are independent contracts, the interpretation and obligation of which should be governed by the lex loci contractus.[72] This law should determine, therefore, the nature and obligation of the drawer's and indorser's contracts in general, the conditions upon which their liability depends and the defences which they may have.

The liability of each party to a bill or note is fixed once for all by the proper law and is unaffected by a transfer of the instrument in another state. If the law governing his contract allows a certain defence, even as against a holder in due course, it will be available to him notwithstanding the fact that the bill or note was negotiated in a jurisdiction under the law of

70. See the cases collected in 61 L. R. A. pp. 206-12, 19 L. R. A. (N. S.) pp. 670-72.

71. On the continent the lex loci of the acceptor's contract will determine also the question whether an acceptance of a bill of exchange raises a presumption in favor of the existence of a "cover." Audinet, p. 615; Diena, III, p. 126; Lyon-Caen et Renault, IV, p. 558; Ottolenghi, p. 194.

72. See the cases collected in 61 L. R. A. pp. 215-22, 19 L. R. A. (N. S.) pp. 672-74.

As regards the regular indorser, see 61 L. R. A. pp. 200-02, 19 L. R. A. (N. S.) pp. 668-70.

which a holder in due course is protected against such a defence.[73] All courts admit also that the character of the instrument as a negotiable or non-negotiable instrument cannot be affected, as regards each party, by a transfer of the bill or note in another state or country where the law is different.[74]

2. LAW GOVERNING PLAINTIFF'S TITLE.

Each party promises to pay the sum specified in the instrument in accordance with the tenor of his contract, which presupposes that the holder has acquired a valid title to the bill or note. The question now is whether the title must be good according to the municipal law of bills and notes of the country in which the party to be charged assumed liability or does the promise to pay embrace any person who has acquired a valid title under the law of the place where the transfer occurred?

a. *English Law:* The Bills of Exchange Act provides as follows:[75]

"Subject to the provisions of this Act the interpretation of the drawing, indorsement, acceptance, or acceptance suprà protest of a bill, is determined by the law of the place where such contract is made.

"Provided that where an inland bill is indorsed in a foreign country the indorsement shall, as regards the payor, be interpretated according to the law of the United Kingdom."

According to this section the acceptor of an order bill promises to pay the same to a party who has acquired title thereto by an indorsement which is valid under the law of the place of indorsement, but the contract of the acceptor of an inland bill, which is indorsed in a foreign country, is to pay to any order or upon any indorsement which is valid by the mercantile law of England. Before the Bills of Exchange Act the English law was in an uncertain state.[76]

---

73. Ory v. Winter, (1826) 4 Mart. (N. S.) 277. See also Diena, III, p. 88; Jitta, II, p. 176; Lyon-Caen et Renault, IV, p. 559; Ottolenghi, p. 219; Weiss, IV, p. 461.

74. Krieg v. Palmer Nat. Bank, (Ind. App. 1911) 95 N. E. 613.

75. B. E. A. Sec. 72 (2).

76. In Lebel v. Tucker, (1867) L. R. 3 Q. B. 77, action was brought against the acceptor of a bill of exchange which was drawn, accepted and payable in England, but was indorsed in blank in France. The court held that "the acceptor having contracted in England to pay in England, the contract must be interpreted and governed by the law of England." There being nothing on the face of the instrument to indicate that the parties contemplated that it might come under the operation of a foreign law

b. *American Law:* There are no American cases which are helpful in the matter now under consideration.[77]

c. *Continental Law:* The Continental law seems to apply the law of the place of indorsement without recognizing a qualification like that laid down by the English Act.

The English courts before the Bills of Exchange Act operated seemingly with the intention theory. If the negotiation of the instrument abroad was, or must be deemed to have been, within the contemplation of the maker or acceptor, liability would exist in favor of an indorsee who had acquired title under the law of the place of indorsement; whereas if no such negotiation was contemplated, the indorsee's title would be determined by the law governing the maker's or acceptor's contract. Notwithstanding a contemplated negotiation abroad, the transfer need not conform, however, to the law of the place of indorsement whenever it clearly appears from the terms of the instrument that the parties contracted with reference to the law of England.

The intention theory, as appears from the English cases, leads to very uncertain results. This is inevitable because of the absence of fixed criteria from which the intention of the parties can be ascertained. The English cases, before the

---

the English law was deemed to express the presumptive intention of the parties. The argument that the indorsement was not sufficient between the indorser and the indorsee and could not transfer, therefore, to the latter, rights against the acceptor was held to be immaterial.

In Bradlaugh v. De Rin, (1868) L. R. 3 C. P. 538 a bill was drawn in Belgium on England. It was accepted in England and was indorsed in blank in Belgium. By a divided court it was held that the law of Belgium must determine the right of the indorsee to sue the acceptor. The court assumed that the indorsee could have no rights against the acceptor unless the indorsement transferred such rights to him under the law of the state where the indorsement was made, the reason being that if the drawer cannot be made liable, the acceptor paying the instrument cannot charge the sum against him. The court overlooked the fact, seemingly, that the argument would apply equally to Lebel v. Tucker. The real explanation of the two cases lies probably in the fact that in Lebel v. Tucker an indorsement abroad was not deemed within the contemplation of the parties while it must have been in Bradlaugh v. De Rin.

In the latest English case on the subject, In re Marseilles Extension Railway & Land Company, (1885) 30 Ch. D. 598, a bill was drawn in France by a Frenchman in the French language but in the English form on a company in England. It was both accepted and payable in England, and was indorsed in blank in France. In an action against the acceptor it was held that English law must govern because the special facts in the case showed an intention that it be an English bill.

77. See Everett v. Vendryes, (1859) 19 N. Y. 436; Brook v. Vannest, (1895) 58 N. J. L. 162, 33 Atl. 382.

passing of the Bills of Exchange Act, were cases where the English law was more liberal than the foreign law in the matter of negotiation. All involved the question of blank indorsements and it was erroneously assumed that the law of the foreign country denied to the indorsee under such an indorsement the right to sue in his own name. As the Convention of the Hague has accepted the Anglo-American law in regard to blank indorsements,[78] it is improbable that cases similar to the above will be presented to an English or American court in the future.

A wide difference between Anglo-American law and that of the Hague Convention continues to exist concerning the genuineness of the indorsements. Under Anglo-American law title cannot be acquired through a forged indorsement.[79] According to the Convention of the Hague the chain of indorsements need only be regular; the indorsements are not required to be genuine.[80] Supposing now that a party has taken a bill or note under such a forged indorsement in a country where it will not affect his title, will he be able to recover as against an English or an American maker or acceptor? This situation was presented in the case of *Embiricos v. Anglo-Austrian Bank.*[81] In that case a Roumanian bank drew a check on a London bank payable to the order of A. A indorsed the check in Roumania specially to B in London. The check was stolen by A's clerk and was cashed in good faith and without gross negligence by a bank in Vienna. At the time of such payment the indorsements were apparently regular and in order, although B's signature was forged. The Vienna bank indorsed the check to C in London, who presented it to the bank on which it was drawn and received payment. In an action by A against C for conversion, Walton, J., gave judgment for the defendant on the ground that the Vienna bank had got title to the check under Austrian law which the English courts were bound to recognize, and had assigned that title to C. The judgment was affirmed by the court of appeal. In the lower court the conclusion was based upon the ground that under the decision of *Alcock v. Smith*[82]

78. Art. 12 of Uniform Law.
79. Arts. 15 and 39 of Uniform Law.
80. N. I. L. Sec. 23; B. E. A. Sec. 24.
81. [1905] 1 K. B. Div. 677 (C. A.), 74 L. J. K. B. 326.
82. [1892] 1 Ch. 238.

the English law would recognize a title to a bill which had been validly acquired under the lex rei sitae. The court seemed to be of the opinion, also, that the judgment could be based upon Section 72 of the Bills of Exchange Act if the word "interpretation" of the indorsement included the legal effect of the transfer by indorsement. The court of appeal accepted the first ground and held that Section 72 of the Bills of Exchange Act contained nothing to prevent the English courts from recognizing the title acquired under Austrian law. Although the action was between the payee and the indorsee it would seem that the same result should follow where suit is brought against the acceptor or the maker. Says Vaughan Williams, L. J.:[83]

"But it would manifestly be an unsatisfactory state of the law if the legal result is that the indorsement is effective to give the indorsee of a bill a good title as against the payee, but not effective according to English law to give that indorsee a good title against the drawer or the acceptor. And it would be convenient, as well from a legal as from a commercial point of view, that it should be established that the title by such an indorsement is good as against the original parties to a negotiable instrument, having regard to the contractual liability incurred by them thereby. I do not think that *Alcock v. Smith* [1892] 1 Ch. 238, decides this question; on the contrary, it seems to me that the judgments of Romer, J., and the Court of Appeal both disclaim so doing; and, further, it seems to me that the law as laid down by Pearson, J., in *In re Marseilles, etc., Land Company*, 30 Ch. D. 598, and by Lush, J., in *Lebel v. Tucker*, L. R. 3 Q. B. 77, 83 is, in effect, authority to the contrary. At all events, it has never been decided that the liability of an acceptor in England of a bill drawn abroad or of the drawer of a cheque payable in England amounts to a contract to pay on a forged indorsement valid by the foreign law, but invalid by the law of England. It may, however, be that the contract of the drawer or acceptor is to pay on any indorsement recognized by the law of England, even though that indorsement be invalid according to what I will call for convenience the local law of England. I am disposed to think that this is the true contract. If the contract of the drawer of a cheque or acceptor of a bill were limited to payment on the indorsements valid by the English local law an argument might be raised that, even though the indorsement abroad was valid to legalize the possession by the indorsee claiming under the foreign indorsement, yet he would

83. [1905] 1 K. B. Div. 677, 684-85.

be guilty of a conversion if he used a negotiable instrument to the possession of which he was entitled for the purpose of obtaining and did obtain payment from an original party to the negotiable instrument from which he could not have recovered by process of law."

The transfer of chattels is governed today in England in accordance with the following rules:

"Rule 143. An assignment of a movable which can be touched (goods) giving a good title thereto according to the law of the country where the movable is situate at the time of the assignment (lex situs) is valid.

"Rule 145. . . . The assignment of a movable, wherever situate, in accordance with the law of the owner's domicile is valid."[84]

In so far as they are consistent with Section 72 (2) of the Bills of Exchange Act these rules can be applied in England to bills and notes. As the Bills of Exchange Act adopts on principle the lex loci contractus as the law governing the transfer of bills and notes, instead of the lex domicilii, Rule 145 can, of course, not be applied. But there is no reason why Rule 143 should not be extended so as to embrace bills and notes. In a case like *Lebel v. Tucker*[85] the law of the situs will be excluded, however, under the positive provision of the Bills of Exchange Act,[86] according to which the contract of the acceptor of an English bill is to be interpreted as requiring an indorsement in the sense of the English Act.

Which rule should be incorporated into the Uniform Law? The writer would submit that the promise of the acceptor or maker of a negotiable bill or note must be deemed to include any party acquiring title to the instrument in accordance with the law governing the contract of such maker or acceptor. As the lex loci contractus determines the extent of the liability of the maker and acceptor in general, a transfer satisfying such law should be sufficient. The case of *Embiricos v. Anglo-Austrian Bank*[87] makes it clear, however, that the law of the situs cannot be ignored. As a party executing a negotiable instrument, or on becoming a party thereto, may be reasonably charged with notice that the bill or note may be transferred in a state other than the state where it was issued or is payable, it would seem but fair to hold that he must

84. Dicey, pp. 519, 525.
85. (1867) L. R. 3 Q. B. 77.
86. B. E. A. Sec. 72 (2) par. 2.
87. [1905] 1 K. B. Div. 677 (C. A.), 74 L. J. K. B. 326.

have submitted to the law of such state as regards the transfer of title. The adoption of an alternative rule in this instance would promote the negotiability of bills and notes and subserve the ends of justice. In the opinion of the writer the Uniform Law should provide, therefore, that each party be held if the holder of the instrument has acquired title thereto in accordance with the municipal law of the state where such party's contract was made, and also if the title is unimpeachable under the law of the place of transfer or the lex rei sitae. The provisions of the Bills of Exchange Act on this point are inadequate.

3. HOLDER IN DUE COURSE.

According to Anglo-American law the equities attaching to a bill or note will be cut off when the instrument passes into the hands of a holder in due course. On the continent, where the holder in due course is unknown, full legal title will be acquired if the purchaser acted in good faith. The Negotiable Instruments Law aimed to unify the law of this country with respect to the question of what constitutes value, but failed to accomplish its purpose, for the New York courts adhere still to their former doctrine that a transfer of a bill or note by way of collateral security for an antecedent debt does not constitute value.[88] Assuming that a bill or note is transferred in a jurisdiction where the holder in due course is unknown to the law, or in a jurisdiction where the term "holder in due course" is defined differently than it is under the lex loci of the maker's or acceptor's contract, which law is to control? The American courts apply now the law of the place of indorsement,[89] but more generally the law of the place of payment,[90] that is, the law governing in their opinion, the obligation of the maker's and acceptor's contract. On principle the question relates clearly to the tenor of the contract of the different parties and should be determined, therefore, in accordance with the lex loci of each contract.

(To be concluded.)

UNIVERSITY OF MINNESOTA. ERNEST G. LORENZEN.

88. The appellate division of the supreme court of New York has held so on a number of occasions. See Sutherland v. Mead, (1903) 80 App. Div. 103, 80 N. Y. Supp. 504; Roseman v. Mahony, (1903) 86 App. Div. 377, 83 N. Y. Supp. 749; Bank of America v. Waydell, (1905) 103 App. Div. 25. The court of appeals has not yet passed uponthe question.

89. Brook v. Vannest, (1895) 58 N. J. L. 162, 33 Atl. 382.

90. Woodruff v. Hill, (1874) 116 Mass. 310; Webster v. Howe Machine Co., (1886) 54 Conn. 394, 8 Atl. 482; Allen v. Bratton, (1872) 47 Miss. 119; Limerick National Bank v. Howard, (1901) 71 N. H. 13, 15 Atl. 641.